



## University of Baltimore Journal of Land and Development

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Volume 6 | Issue 1

Article 5

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2016

# Community Benefits Agreements: To The Extent Possible

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### Recommended Citation

Clarke, Charlotte (2016) "Community Benefits Agreements: To The Extent Possible," *University of Baltimore Journal of Land and Development*: Vol. 6 : Iss. 1 , Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ubjld/vol6/iss1/5>

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# ARTICLES

## COMMUNITY BENEFITS AGREEMENTS: TO THE EXTENT POSSIBLE

Charlotte Clarke

### INTRODUCTION

The focus of this paper pertains to a relatively new concept known as a Community Benefits Agreement (hereinafter “CBA”). Although this concept was born in the nineties<sup>1</sup>, for the purpose of addressing the impacts of development projects on communities, CBAs recently gained momentum as a result of cities and municipalities becoming increasingly popular for large scale developments such as sports arenas and high rise apartment buildings.<sup>2</sup> At their inception CBAs allowed communities to negotiate directly with developers, and gave communities the opportunity to address problems associated with a development project.<sup>3</sup> CBAs are defined differently depending on whom one asks, however, generally a CBA is a contract or agreement between a developer and a community group or community coalition in the area a developer plans to build.<sup>4</sup> CBAs contain a set of guidelines or rules that developers should abide by to ensure that the community benefits from the project or proposed development.

A development project can produce many positive outcomes for municipalities and states alike, such as: government attention, increased services to neighborhoods involved in the development, building restoration, enter-

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1. Patricia E. Salkin, Amy Lavine, *Community Benefits Agreements And Comprehensive Planning: Balancing Community Empowerment And The Police Power*, 18 J.L. & Pol’y 157, 177 (2009) (citing Patricia Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. Envtl. L. & Pol’y 291, 301-306) (discussing the Hollywood and Highland CBA).
  2. Patricia E. Salkin, Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice And Other Considerations For Developers, Municipalities And Community Organizations*, 26 UCLA J. Envtl. L. & Pol’y 291, 292-297 (2008).
  3. *Id.* at 292-93.
  4. See generally Julian Gross, *Community Benefits Agreements: Definitions, Values, And Legal Enforceability*, J. AFFORDABLE HOUS. & CMTY. DEV. L., Fall 2007/Winter 2008, at 35- 37 (2008).

tainment, an increased tax base, and an increased property value.<sup>5</sup> However, such development also causes gentrification.<sup>6</sup> Generally speaking, gentrification is an influx of more affluent residents which disproportionately changes the demographic of a particular area, causing the previous residents to relocate.<sup>7</sup> Development projects cater to individuals in a higher socioeconomic status by offering expensive retail and entertainment options.<sup>8</sup> This causes the displacement of many residents who can no longer afford to live in their communities, or surrounding neighborhoods, as a result of a project increasing property values or increasing the base rent for a particular area.<sup>9</sup> Urban development highlights gentrification, displacement, and low community involvement.<sup>10</sup>

Hopefully CBAs can prevent gentrification from taking place by creating benefits for the preexisting community, coupled with community involvement pertaining to a project.<sup>11</sup> Optimistically, those incentives will encourage existing residents to remain in their neighborhood, and the character of the community will not drastically change as a result of gentrification. Even with a CBA in place, that does not necessarily mean that an area will stay affordable or that gentrification will halt completely.

As previously mentioned, in a CBA the developer promises services or goods to the community in exchange for their support for the project, or in exchange for acquiescence concerning the project. For example, a CBA can contain a clause that states that the developer provides for a public park available to those who live in the community; that the developer plows the streets adjacent to the project after a snow fall; that the developer employs at least fifty percent of the workforce from the community; that ten percent of the housing units in a proposed project are affordable housing units; and

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5. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence And The Obligations Of The Police Power*, 8 U. PA. J. CONST. L. 1, 5-26 (2006) (citations omitted).
  6. See *Id.* at 26-28 (2006) (the process of gentrification has two different narratives, one that includes governmental involvement and one that does not. However, gentrification is exclusively a private enterprise that includes the purchasing of buildings by developers, speculators, or affluent people which changes the social character of the area in development) (citations omitted).
  7. See generally Brian D. Feinstein & Ashley Allen, *Community Benefits Agreements With Transit Agencies: Neighborhood Change Along Boston's Rail Lines And A Legal Strategy For Addressing Gentrification*, 38 TRANSP. L.J. 85, 89 (2011).
  8. Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223, 228 (2008) *internal citations omitted*.
  9. *Id.*; See also McFarlane, *supra* note 5, at 5.
  10. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, And The Democratic City*, 123 HARV. L. REV. 482, 509-10 (2009).
  11. See *Id.*; see also generally McFarlane, *supra* note 6, at 5.

the list continues. Every CBA is unique, just as every contract between private parties is unique. For the purpose of this paper we will explore the concept as a whole rather than the particulars of each agreement.

The main goal of this paper is to identify the negative aspects of a CBA, and how those aspects effect the agreement. In order to understand the negative features of CBAs, we need to understand if and when a CBA will work in a way that truly benefits the community. Additionally, this paper discusses the positive qualities of CBAs, while contemplating methods to improve its functionality. CBAs are a great idea in theory, but three main reasons prevent CBAs from being effective: (1) they lack legal enforceability; (2) communities lack political power to include tangible benefits; and lastly the question of whether accurate community representation takes place and the question of whether the desires of a community are included in the agreement. How do we rectify all of these problems? Is there a way to ensure that a CBA is a legally enforceable document? Is there a way to give communities political power? And is there a way to ensure that the community's goals are represented?

In order to grasp whether this concept can be successful, we must first understand the history of CBAs. Part I of this paper describes the general purpose of a CBA, summarizes the components, and explains the history of CBAs. CBAs grew from a long history of negotiations between multiple actors, and are similar to, or a subset of, a traditional Development Agreement.<sup>12</sup> Part II provides three examples of CBAs: the Atlantic Yards CBA signed in 2005, the Bronx Terminal Market CBA signed in 2006, and a more recent CBA signed in February of 2016. This section will showcase the various benefits provided, but also reveal the downsides of these agreements.

Part III discusses the examples previously given and pinpoints the problems associated with those examples. For example, the lack of enforceability because many community organizations do not have standing to file suit, or simply do not have the financial means and organizational skills to file a complaint against a developer with unlimited financial capabilities and political clout. Additionally, CBAs that do not bind future organizations or parties provide no remedies for communities in the future if a development project changes ownership. Many CBAs contain vague language such as "to the extent possible," which gives developers a mechanism for default<sup>13</sup> with no recourse.

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12. Vicki Been, *Community Benefits Agreements: A New Local Government Tool Or Another Variation On The Exactions Theme?*, 77 U. CHI. L. REV. 5, 6 (2010).

13. Default in the sense that they are not bound to provide what was promised in the agreement.

Part IV proposes several ideas as to how we can rectify the problems mentioned in Part III. For example, creating a state statute, or a city or county ordinance that requires developers to enter into a legally binding contract with the community prior to a projects approval, at least in some part, may rectify the problems that occur. With proper legislation that requires a developer to enter into a CBA coupled with rights given to the community to enforce the agreement, some of the inherent problems associated with CBAs can be solved. This paper's conclusion suggests that, while CBAs have great intentions, the lack of legal enforceability combined with a community's lack of power, the extent to which a CBA provides tangible benefits to the community is limited.

## PART I - WHAT IS A CBA?

What is a CBA? Who is involved in a CBA? At what point in a development's life span is a CBA considered? Who negotiates with developers — the community, local governments or the state? When a CBA is in place, who is responsible to ensure compliance and who has standing to enforce such compliance? How do CBAs currently operate? Do CBAs work for the betterment of the community? These are just a few of the questions raised when CBAs are generally discussed. Years of negotiating agreements between private developers and citizens lead us to these questions. To answer those questions, we must first understand the general purpose and history of CBAs.

### *A. CBAs spawned from Development Agreements*

CBAs are similar to, and can be understood as, a subspecies of another type of agreement, a development agreement. A development agreement is also a contract with a developer, but the other contracting party is a local governmental planning agency.<sup>14</sup> These agreements involve a developer's promise to restrict the use of land, or provide benefits to the general public.<sup>15</sup> In exchange, local governments promise to halt certain land use laws and zoning laws for a fixed period of time.<sup>16</sup> By doing so, this provides guarantees to the developer that construction is not halted as a result of those laws.<sup>17</sup> Many states have statutes pertaining to development agreements, including: South Carolina, Oregon, New Jersey, Nevada, Louisiana,

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14. See Salkin & Lavine, *supra* note 2, at 331, n.6 (citing generally David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. R. 663 (2001)).

15. *Id.*

16. *Id.*

17. *Id.*

Idaho, Hawaii, Colorado, Arizona, and Washington.<sup>18</sup> It is important to note that once a CBA has been finalized it can, in some cases, merge with the development agreement.<sup>19</sup> It is also important to note that most states do not permit local governments to enter into development agreements; therefore, most CBAs are only enforceable through the contracting community organizations.<sup>20</sup>

CBAs differ from development agreements because the parties to the contract are different. CBAs are contracts or agreements between a developer and a community organization, or a community coalition, in which the developer promises to provide specific accommodations to a community in exchange for their support for the project, or in exchange for a community's pliancy towards a project.<sup>21</sup> CBAs are bilateral contracts, meaning that both parties agree to the performance of a determined act in exchange for the other party's performance of a determined act.<sup>22</sup> They can contain specific stipulations concerning public benefits and amenities that a developer shall provide to the affected community.<sup>23</sup> Although CBAs are considered a recent concept in local economic development, they grew from a vast history of negotiations between a multitude of actors, such as developers, public officials, land use authorities, stake holders, environmental organizations, and communities.<sup>24</sup>

### *B. History of CBAs*

The history of the modern understanding of a CBA originated from several campaigns in the early nineties concerning the development of the entertainment industry in California.<sup>25</sup> One of the campaigns involved the Los Angeles Metropolitan Alliance Coalition (hereinafter "LAMA")<sup>26</sup> and

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18. *Id.*

19. See Salkin & Lavine, *supra* note 2, at 295.

20. *Id.* (citing Julian Gross, *Community Benefits Agreements: Making Development Projects Accountable* <http://www.goodjobsfirst.org/publications/community-benefits-agreements-making-development-projects-accountable> (last visited April 12, 2016)).

21. See generally Gross, *supra* note 4, at 36-7.

22. See generally Feinstein & Allen, *supra* note 7, at 98-99.

23. Salkin & Lavine, *supra* note 2, at 293-94.

24. See Been, *supra* note 12, at 6.

25. Doug Smith, *Community Economic Development, Regionalism, and Regional Equity: Emerging Strategies and Changing Roles for CED Attorneys*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 2013, at 315, 329-30 (2013) (citations omitted).

26. *Id.* at 326-29. (LAMA was a combination of several community groups and grassroots organizations such as Action for Grassroots Empowerment and Neighborhood Development Alternatives ("AGENDA"), Community Economic Development Unit of the Legal Aid Foundation of Los Angeles ("LAFLA"), and

DreamWorks Studios.<sup>27</sup> LAMA, along with other organizations, noticed the swift development taking place in the entertainment industry in California, and the assortment of production companies and studios building congruently.<sup>28</sup> LAMA used the opportunity to address the needs of low-income communities adjacent to the construction and advancement taking place in the entertainment industry. The group negotiated with DreamWorks, and was able to come to an agreement that provided career opportunities and training to low-income residents of southern California.<sup>29</sup> Unfortunately, DreamWorks did not proceed with their project for a new studio.<sup>30</sup> However, they did not abandon their promise to low-income residents and provided five million dollars to create an employment training organization called Workplace Hollywood.<sup>31</sup> At the time of this agreement it was not termed a CBA, but it bears a striking resemblance to what we currently consider a CBA today.

Another agreement in California in the late nineties that resembled a modern day version of a CBA related to the Hollywood and Highland Center, a massive theatre and retail space.<sup>32</sup> The estimated cost of the 1.2 million square foot project was over three hundred million dollars and included parking lots, hotels, retail space, and over four thousand theatre seats.<sup>33</sup> The thought of the immense flood of traffic, environmental concerns, and criminal activity among other things, worried the residents in Hollywood.<sup>34</sup> Jackie Goldberg, a council member in Los Angeles, teamed up with the Los Angeles Alliance for a New Economy to express the concerns of the citizens of Hollywood.<sup>35</sup> With the community, they were able to come to an agreement with the developer to ensure that this project was beneficial to all parties affected.<sup>36</sup> The community supported the project while the developer agreed to establish a first source hiring plan within the community, and promised that the employees were to be paid living wages.<sup>37</sup>

Additionally, the developer agreed to finance traffic improvements to the

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Los Angeles Alliance for a New Economy ("LAANE").

27. *Id.*: *Our History*. DREAMWORKS ANIMATION, LLC, <https://www.dreamworksstudios.com/about/history> (last visited May 1, 2016).

28. Smith, *supra* note 25, at 328-30.

29. *Id.* at 329-30.

30. *Id.* at 330.

31. *Id.*

32. Been, *supra* note 12, at 35.

33. Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities And Traps For Developers, Municipalities And Community Organizations*, SN005 ALI-ABA 1407, 1412-13 (2007).

34. *Id.* at 22.

35. *Id.*

36. *Id.*

37. *Id.*

area.<sup>38</sup> The support from the community cemented the developer's hopes to obtain subsidies from the city.<sup>39</sup> As a result of the support from the community, the city granted the developer \$90 million in subsidies.<sup>40</sup> There is debate as to whether his agreement constitutes a CBA,<sup>41</sup> however. Either way, this is a great example of the potential CBAs have to impact communities for the better.<sup>42</sup>

### C. CBAs Today

After the success that multiple municipalities in California had with CBAs comparable to standard contracts, the entire state began to test the concept.<sup>43</sup> Subsequently, CBAs engulfed California, and it did not take long for other states to experiment with their use. Eventually, community organizations in other cities began to negotiate their own CBAs; these cities include, but are not limited to, New York, Chicago, Boston, Washington, and Miami.<sup>44</sup> The agreements are negotiated on a case by case basis, which is very appealing to communities that have specific needs.<sup>45</sup> Not only are these agreements helpful for the communities that receive the benefits, but they are also a helpful tool for developers. If a particular developer seeks tax increment financing, government subsidies, zoning variances or permits, having support from the impacted community will greatly influence the development's approval.<sup>46</sup> It can also expedite the required procedures.<sup>47</sup> If a developer has a CBA in place prior to a plan's approval, there will be less community criticism towards that project compared to the criticism a developer receives when it does not communicate with the affected community.<sup>48</sup> The support from the community could potentially save developers

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*; distinguished by Vicki Been, *Community Benefits Agreements: A New Local Government Tool Or Another Variation On The Exactions Theme?*, 77 U. Chi. L. Rev. 5, 35 (2010) ("...also might qualify as a CBA. However, because those negotiations involved a city council member, the agreement may be more appropriately characterized as an exaction.").

42. See Salkin, *supra* note 36, at 1412-13 (2007) (the Hollywood and Highland agreement was seen as a great success to both the developer and the community, and lead the way for the Staple Center CBA).

43. Been, *supra* note 12, at 10-11.

44. Salkin & Lavine, *supra* note 2, at 293-94.

45. *Id.*

46. *Id.*

47. *Id.*

48. See generally Julian Gross, *Community Benefits Agreements: Making Development Projects Accountable*  
<http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf> (last



money in the sense that negative feedback pertaining to their plans might result in losing project financing or legal fees.<sup>49</sup>

Some CBAs have provisions that stipulate the developer hire a certain percentage of their employees locally, and that those employees are paid living wages. Although some believe paying living wages is counterproductive because developers would have to allocate more money for their employees, in the long run it actually saves developers money. Studies show that higher wage employees have less turnover resulting in increased productivity and the reduction of training and recruitment costs.<sup>50</sup> Why would a developer resist a community demand for living wages when it is to the developer's benefit? Meaning, why does the developer need the community to tell them how to best do their project? Why can't they figure this out themselves?

Additionally, a governmental body that provides financing to a developer is more likely to delay a project's progress when there is a controversial issue associated with the project, such as a community's resistance.<sup>51</sup> Developers often receive subsidies from cities or states as an incentive to build projects in those cities or states.<sup>52</sup> Even though there is evidence to the contrary, municipalities believe that providing subsidies will lure developers to their locations, which eventually leads to positive outcomes for the community.<sup>53</sup> If a CBA is linked to a subsidy, or a similar incentive from the government, community organizations have power if they can influence which developer is awarded the subsidy.<sup>54</sup>

A government agency can play an active role in the negotiation process, but that does not necessarily mean that the agency's involvement is required.<sup>55</sup> Many CBAs involve real estate transactions.<sup>56</sup> Therefore, commu-

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visited April 12, 2016).

49. *Id.*

50. *Id.* at 39. ("One study found that employers' costs from turnover are at least 150% of the employees' base salary. In addition, some costs of higher wages are either absorbed by the employer or passed on to consumers. In general, studies find that the overall cost to employers of paying a living wage is minimal.")

51. *Id.* at 22.

52. Schragger, *supra* note 10, at 495.

53. *See Id.*

54. Been, *supra* note 12, at 10-11.

55. *See Id.* at 7-8, *citing* for example, ATLANTIC YARDS DEVELOPMENT CO, Community Benefits Agreement 54 (Brooklyn United for Innovative Local Development, June 27, 2005), *available at* <http://www.buildbrooklyn.org/pr/cba.pdf> (last visited Nov 9, 2009) (showing Mayor Michael Bloomberg signing as "witness"), *citing also* Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS & CMTY. DEV. L. 35, 42 (2008) (noting that the Bronx borough president and three members of the city council signed the New York Yankees CBA) *citing also* for example Gross, LeRoy, and Janis-Aparicio, Community Benefits Agreements at 29 (cited in note 1).

nity organizations have power based in their capacity to aid or block required land use approvals that a developer must obtain.<sup>57</sup> Therefore, when a developer is able to guarantee community support with a CBA prior to their request from the government, their ability to navigate through regulatory and funding obstacles could considerably change for the better.<sup>58</sup>

Throughout the lifespan of a development project there is no specific time that CBA negotiations must take place. However, for a community that wants their demands heard, the most beneficial timeframe for negotiations to take place is after a developer announces their plan, but prior to their plan's approval. Developers may begin their discussions with the community before or after the project's approval, or never at all.<sup>59</sup> Community organizations may approach the developer at any point during this process, or never at all.<sup>60</sup> There is no set time frame that a developer, or a community, must contact each other to negotiate. Negotiations work best for the community if that community has a large number of constituents that are vocal and involved in the process, and if the developer needs their support to obtain approval or subsidies.<sup>61</sup> Communities participate and express their concerns through surveys, workshops, public meetings and public hearings.<sup>62</sup> The appointed leaders of a community group, coalition, or organization are the individuals that are most heavily involved in the negotiation process.<sup>63</sup>

## PART II - EXAMPLES OF CBAS IN ACTION

The reputation of the Californian CBAs is positive.<sup>64</sup> Those agreements provided an avenue for community involvement in an otherwise hostile, public review process of private development projects.<sup>65</sup> However, this section provides three examples that cast doubt on the legitimacy of such agreements. We will focus on the Atlantic Yards CBA in 2005, the Bronx Terminal Market CBA in 2006, and a recently signed CBA in February of 2016. By examining these agreements, we can identify the benefits provided and the recipients of those that receive the benefits. Additionally, after reviewing these CBAs scrupulously, we begin to understand the inherent problems. Analyzing the provisions and clauses of each CBA demonstrates

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56. Been, *supra* note 12, at 10-11.

57. *Id.*

58. *Id.*

59. Been, *supra* note 55, at 10-11.

60. *Id.*

61. Salkin & Lavine, *supra* note 23, 296-97.

62. *Id.*

63. See Been, *supra* note 12, at 7.

64. Sheikh, *supra* note 8, at 225.

65. *Id.*

that these agreements lack enforceability, lack tangible benefits for the community, and lack community representation.

### *A. Atlantic Yards CBA*

One of the more recent and famous CBAs took place in New York City.<sup>66</sup> It is widely known as the Atlantic Yards CBA, or plainly, Atlantic Yards. The location for the project was downtown Brooklyn, in an area that was previously State owned.<sup>67</sup> The development plans included retail space, housing, and office space.<sup>68</sup> The project received \$300 million in subsidies from New York State and New York City.<sup>69</sup> The developer announced the project in December of 2003, and in June of 2005 the CBA was signed.

The agreement itself planned to address many different issues for the community and the concerns associated with the development. This included, but was not limited to, job development and training, educational initiatives, public housing, environmental impacts as a result of the project, and small business development.<sup>70</sup> The Atlantic Yards CBA promised numerous benefits to the community which were not available prior to the agreement.<sup>71</sup> For example, the CBA contained provisions that pertained to job training, a health center, affordable housing units, and community amenities such as an open, green space.<sup>72</sup>

The Atlantic Yards CBA received positive and negative feedback. The negotiations between the community groups and the developer took place secretly, and did not include a large portion of the community.<sup>73</sup> Additionally, “the project’s government partner, a state economic development authority, overrode all of the local zoning and planning laws in order to expedite the development.”<sup>74</sup> Because of this, the project’s approval was not reviewed by city officials and was finalized before an environmental impact statement or study was conducted.<sup>75</sup> Members of the community organizations involved in the CBA are already upset with the lack of benefits pro-

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66. *Id.* at 230-32.

67. *Id.*

68. *Id.*

69. Nathan Markey, *Atlantic Yards Community Benefit Agreement: A Case Study Of Organizing Community Support For Development*, 27 PACE ENVTL. L. REV. 377, 383-87 (2010) (estimating the \$300 million figure and arguing that the Atlantic Yards CBA would benefit the community if not for the negative pushback).

70. *Id.*

71. *Id.*

72. *Id.*

73. Salkin & Lavine, *supra* note 1, at 198-99.

74. *Id.* (because there was not an environmental impact statement many of the CBA signatories are, most likely, unaware of the extent of the impact of from the project).

75. *Id.*

vided, even though there were specific provisions in the agreement.<sup>76</sup> Although a job training program did launch, unfortunately, the launching lead to a law suit instead of tangible careers.<sup>77</sup> According to community members, employment has not increased and little business has developed as a result of the Atlantic Yards CBA. Subsequently, members of the community created a Twitter Campaign called “Devotion NYC” to raise community awareness and public pressure in the hopes to help their efforts of enforcing the agreement.<sup>78</sup>

### *B. Bronx Market Terminal CBA*

Another CBA that took place in New York City was the Bronx Market Terminal. This CBA was signed in February of 2006. Prior to the development of this area, Exterior Street in the Bronx, some considered the area blighted. The project planned to turn the Bronx Terminal Market into a retail complex. The terminal was originally built in the 1920s, and prior to the insurgence of redevelopment, the area provided space for local vendors and small businesses for decades. Among other provisions, the developer promised the community a new public park, a commitment to make “reasonable efforts” to employ union labor, a local hiring program, training and apprenticeship programs, and agreed not to lease retail space to Wal-Mart.<sup>79</sup> As of 2011, 75% of the jobs associated with this project were awarded to Bronx residents and 40% of the contracts were awarded to Bronx based business, which actually exceeded the requirement in the CBA.<sup>80</sup> One of the complaints pertaining to this CBA is that the negotiation process was extremely secretive.<sup>81</sup> This left many community groups and organizations out of the agreement; therefore it did not represent the community as a whole.<sup>82</sup>

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76. See Norman Oder, *Fair Play! New effort (from former BUILD officer) to enforce Community Benefits Agreement, despite lack of formal standing*, ATLANTIC YARDS/PACIFIC PARK REPORT (Feb. 11, 2016), <http://atlanticyardsreport.blogspot.com/2016/02/fair-play-new-effort-from-former-build.html> (law suit was settled with undisclosed terms).

77. *Id.*

78. *See id.*

79. *See The Gateway Center at Bronx Terminal Market CBA*, COMMUNITY BENEFITS AGREEMENTS (Aug. 14, 2009), <http://communitybenefits.blogspot.com/2009/08/gateway-center-at-bronx-terminal-market.html>.

80. *Summary and Index of Community Benefit Agreements*, THE PUBLIC LAW CENTER, 1, 23 (2011) [http://www.law.tulane.edu/uploadedFiles/Institutes\\_and\\_Centers/Public\\_Law\\_Center/Summary](http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Public_Law_Center/Summary%20and%20Index%20of%20Community%20Benefit%20Agreements.pdf)

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81. *See id.*

82. *See id.*

*C. Bridgeport Connecticut Community Environmental Benefits Agreement*

A more recent CBA signed in February 2016, promises to focus on the environmental impact of a new gas fired plant in Bridgeport Connecticut.<sup>83</sup> The agreement contained a health related project for Bridgeport residents, improvements for environmental benefits, plans to retire the coal-fired Bridgeport Harbor Station power plan, renewable energy investments, and a community liaison officer to be the main point of contact with community groups to work with the community to support local and regional hiring.<sup>84</sup> The Mayor of Bridgeport Connecticut stated that, “[t]his will create hundreds of jobs, replace the last coal fired plant in Connecticut, and contribute an estimated \$5,000,000 annually to our tax base. This will move us to a cleaner energy future and give us reliable power for many years.”<sup>85</sup>

Only the future will tell what comes of this CBA; however, there are a few provisions contained within this agreement that already cause concern. For example, page six of the agreement states that:

[T]he parties agree that there is no exception or limitation to the commitment of the Community groups not to oppose the Project or issuance of any Permit for the Project for any reason in any local, state or federal executive, legislative or judicial form provided [there are no] Material Change[s] to the Project.<sup>86</sup>

If I were a member of the community this would puzzle me and scare me. This provision seems like a slippery slope, and that the developer has the potential to take advantage of the community’s demands or opinions if they feel strongly about a particular issue. Also, what does the term “material change” mean? The CBA does not contain specific definitions or examples of the term “material change” or of what a material change could look like. There is other vague language in this CBA that states the developer will make good faith efforts to hire locally.<sup>87</sup> What are “good efforts”? Additionally, the project cost is \$550 million; however, it is only estimated to create 300 jobs, only 20 of which are permanent.

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83. This CBA slightly differs from others as it focuses on the environment, as well as the community. This CBA is a Community Environmental Benefit Agreement. For the purpose of this paper I will continue to use the term CBA for this particular agreement.

84. Mayor Joseph P. Ganim Bridgeport, CT, *Press Release Announcing Signing of Community Environmental Benefits Agreement* (Feb. 25, 2016), [http://www.ct.gov/csc/lib/csc/pending\\_petitions/2\\_petitions\\_1201through1300/pe1218/filing/pe1218\\_exhibitg.pdf](http://www.ct.gov/csc/lib/csc/pending_petitions/2_petitions_1201through1300/pe1218/filing/pe1218_exhibitg.pdf) (this contains the press release and a copy of the actual agreement).

85. *Id.*

86. *Id.* at 8 (discussing only material changes related to permits).

87. *Id.* at 10.

## PART III - WHAT ARE THE NEGATIVE ASPECTS OF CBAS?

Now that we appreciate the content of a CBA, we can hone our focus on the negative aspects of a CBA. We examined the provisions of the CBAs mentioned in Part II and now we can address the inherent problems. Analyzing the provisions and clauses of each CBA demonstrates that these agreements lack enforceability, lack tangible benefits for the community, and lack community representation.

*A. CBAs lack enforceability*

One of the biggest underlying issues associated with CBAs is the question of enforceability. It depends on who actually signs the document and the nature of the provisions included in the document.<sup>88</sup> If a community organization is included in the CBA, and legally signs the agreement, technically they have legal standing to attempt its enforcement.<sup>89</sup> As a general practice, however, contract law only permits signatories and parties to the contract to enforce its provisions.<sup>90</sup> Therefore all community organizations, or coalitions, should ideally sign a CBA separately to ensure that each group can attempt enforcement.<sup>91</sup> If not, an organization that took part in negotiations but did not sign the physical document may not have standing to enforce the agreement.<sup>92</sup>

“[L]egal enforceability should be a prerequisite for something to be termed a CBA,”<sup>93</sup> but how do we make that a reality? CBAs that do not bind future organizations or parties provide no remedies for communities in the future if a development company is purchased by another business, or if a community association decides to reorganize. A CBA that does not bind future parties can cause future problems “in determining the allocation of rights and remedies under the CBA.”<sup>94</sup> One of the provisions of a CBA should bind future tenants, contractors, buyers, or community groups to the provisions within the agreement.<sup>95</sup> If this provision is not included, future parties are not bound to the provisions contained therein and will lack pow-

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88. See generally Julian Gross, *Community Benefits Agreements: Making Development Projects Accountable* <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf> (last visited April 12, 2016).

89. Feinstein & Allen, *supra* note 7, at 98-99.

90. *Id.*

91. *Id.*

92. *Id.*

93. Gross, *supra* note 4, at 39.

94. *Id.*

95. Feinstein & Allen, *supra* note 7, at 98-99.

er to enforce those provisions.<sup>96</sup>

Another issue relating to the parties signing a CBA is that many community organizations are unincorporated, therefore when an individual signs the CBA they must confirm that they are signing on behalf of the organization.<sup>97</sup> And, they must confirm that they have the power to make such a signature.<sup>98</sup> On top of being unincorporated, many community groups lack the organization skills and funding to file a complaint against a developer with unlimited financial capabilities and political clout.

*B. Vague provisions in a CBA lead to confusion and more enforceability issues*

Irrespective of a party's ability to enforce the document, many CBAs include vague provisions and undefinable language, so much so that an attempt to enforce a certain provision is futile. For example, in the CBA between the Atlantic Yards Development and various New York City coalitions, some of the benefits conferred to the community are followed by provisions that state "to the extent possible[.]"<sup>99</sup> Including such language leaves room for developers to renege on their promises.<sup>100</sup> The Atlantic Yards CBA also contains language that allows the developer to change certain aspects of the development at their discretion. For example the Atlantic Yards agreement states, "[t]he Developer may change the Development Phases in their sole discretion prior to commencement of the first Development phase; provided that they shall provide advance notice to the Executive Committee as soon as reasonably practicable."<sup>101</sup> One could think of a situation where the first phase was a week away from starting and the developer needed to make a change, would that leave enough time to notify the committee "as soon as reasonably possible[?]"<sup>102</sup> Language such as, "make every effort[.]"<sup>103</sup> or "hire a portion" of individuals from the community,<sup>104</sup> or "dedicate resources [the developer] deems reasonably necessary" is indeterminate and unclear. Does this type of language indicate that communities are to assume that developers will honor the agreement? Should communities take the developers word for it, with little recourse in the event that a developer violates the contract? It seems as if developers specifically add provisions that are vague, mysterious, and unenforceable.

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96. *Id.*

97. Sheikh, *supra* note 8, at 233-36.

98. *Id.*

99. Atlantic Yards, *Community Benefits Agreement*, at page 34.

100. *Id.*

101. *Id.* at 11.

102. *Id.*

103. *Id.* 13.

104. *Id.* at 15.

Unlike developers that have the opportunity to break their promises, once the project is completed the community does not have the luxury of retracting their support. After completion of the project the community already has a stadium or Wal-Mart in the neighborhood, or members of the community were already forced to relocate. Additionally, even if one of the community coalitions involved in the Atlantic Yards CBA wanted to enforce the document, the developer still has a way to skirt its obligation. As it states:

“If, at completion of construction of each Development Phase, the ICM determines that the relevant Developer has not adequately fulfilled its obligations under this initiative, such Developer shall pay to Executive Committee, as liquidated damages for such failure, in accordance with Section XIII, Part C below, the sum of \$500,000 to be used by BUILD to fund the Pre-Apprentice Training Initiative. Upon making such payment, all of the Developer’s obligations under this Section for the Development Phase at issue shall terminate.”

Although 500,000 dollars is a significant amount of money to any lay person, that amount is not unfathomable for any large company. In fact, it is routine for developers to exchange millions of dollars during the course of the projects. Therefore, if a developer can afford to breach the contract, pay the amount stipulated, and only needs the CBA to appease the community, or local officials, what is stopping them from executing an agreement knowing that they plan on defaulting? They simply pay the fine and are thereby not required to provide the promised benefit? A developer’s promises are not the only vague aspects of the Atlantic Yards CBA. It is unclear as to what the community organizations support obligations are to the developer, whether they are political or verbal.<sup>105</sup>

One aspect of the Atlantic Yards CBA is very clear. If any community groups that signed the CBA fails to perform the tasks given to them, that group will default and only has 60 days to remedy that default.<sup>106</sup> At that point the parties will mediate, and if that fails the developer suspends their obligations under the CBA.<sup>107</sup>

*C. Who are the parties involved? Do CBAs represent the community? Are they inclusive?*

As previously mentioned in Part I, if a governmental agency is a party to the contract or if the CBA is incorporated into the development agreement, the enforceability issues differ from that of a regular bilateral contract. If a

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105. See Sheikh, *supra* note 7, at 233-36.

106. *Id.*

107. *Id.*



community organization is as a third party beneficiary in a development agreement because the CBA was incorporated into that document, questions of enforceability still exist. However there is precedent that suggests a community organization, as a third party beneficiary, can enforce the CBA through the development agreement.<sup>108</sup> Even though development agreements provide the best framework for the incorporation of a CBA, it is important to remember that most states do not permit local governments to enter into development agreements.<sup>109</sup> Therefore, most CBAs can only be enforced by the contracting community organizations.<sup>110</sup>

If most states do not allow local governments to enter into development agreements, therefore making it nearly impossible for a CBA's incorporation, there any use or benefit for the community as a party in the CBA contract? Why would a community organization become involved in a project when the promised benefits are not guaranteed and there is no method to enforce the promise? This is a continuous overarching concern associated with CBAs.<sup>111</sup> When a CBA is executed, without incorporation into a development agreement, how can we ensure that the community can actually enforce its provisions? Must community organizations have clout to attempt enforcement? If a community organization is concerned about a proposed development that affects land use entitlements or other environmental concerns, how can they ensure their opinions are considered?

As seen in the Bronx Terminal CBA, inclusivity is not always guaranteed. When a CBA is inclusive, it allows for the discussion of community interests and gives the sense that what is taking place satisfies community's interests.<sup>112</sup> For a CBA to be effective, the community groups involved need sufficient leverage to achieve their goals, and sufficient leverage to attempt enforcement.<sup>113</sup> A community's leveraging power usually stems from the amount of their public participation, inclusivity in the negotiation process, and their ability to hold elected officials accountable.<sup>114</sup> In certain cases, a

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108. Feinstein & Allen, *supra* note 7, 98-99.

109. *Id.*

110. Salkin & Lavine, *supra* note 2, at 295.

111. Julian Gross, *Community Benefits Agreements: Definitions, Values, And Legal Enforceability*, 17:1-2 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35, 36 (2008). ("When promises are not enforceable, community groups that care about those promises are justly skeptical as to whether they will be kept—and are wise to take that into account when considering whether to support or oppose a project. This concern has been part of the impetus toward CBAs, which are only one of several viable legal mechanisms that can create private enforcement rights with regard to community benefits commitments.").

112. Markey, *supra* note 69, at 391-92.

113. See Harold Meyerson, *No Justice, No Growth*, THE AMERICAN PROSPECT (Nov. 2006), <http://prospect.org/article/no-justice-no-growth>.

114. See Benjamin Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 77, 94-95

developer needs the project to be in a specific location or needs to obtain subsidies for their project.<sup>115</sup> This could provide a large amount of leverage to the community organizations in that particular area.<sup>116</sup> CBAs “work best when there is substantial agency money invested, when they [are] big projects, and when they [are] in hot markets or emerging markets.”<sup>117</sup> However, when the area is not an emerging market the proposal of a CBA can persuade the developer from investing in that area and push them to find less expensive locations.<sup>118</sup>

Additionally, the amount of time, effort, money, and power needed to create a well-functioning community organization is a not an easy task.<sup>119</sup> Community organizations are often disorganized, underfunded, and do not represent all interests of the community.<sup>120</sup> The level of effort, organizational skills, and financial obligations drastically increases when varying community coalitions must unite to tackle a developer with unlimited finances and political power.<sup>121</sup> Also, it is naïve to think that community organizations that live in the same area will have identical goals.<sup>122</sup> Unfortunately, a developer will often require that community organizations act collectively to obtain the benefits requested. If those groups are unable to do so, developers entice specific groups to push their agenda or become a party to the contract.<sup>123</sup> This leads to conflict between members of the community and often leads certain organizations being unrepresented in the

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(2008).

115. See Meyerson, *supra* note 113.

116. *Id.*

117. *Id.*

118. See Beach, *supra* note 113, at 94-95.

119. Salkin & Lavine, *supra* note 2, at 31.

120. *Id.*

121. *Id.* (“Where a coalition is inexperienced in creating CBAs, for example, it may need guidance as to the types of benefits that it can receive. The funding required to conduct research for CBA provisions and to pay for legal counsel may also inhibit the negotiating process.”).

122. For example, in the 21211 zip code, the Greater Remington Improvement Association has significantly different goals compared to the Remington Neighborhood Alliance. The Greater Remington Improvement Association is in support of neighborhood commercial, while the Remington Neighborhood Alliance is against neighborhood commercial. See, e.g., *Neighborhood Plan*, Greater Remington Improvement Association, <http://www.griaonline.org/neighborhood-plan/> (last visited Jan. 28, 2017); see also *Neighborhood Commercial*, Zoning Matters in Remington: Saving Remington from the New Zoning Code, <http://zoningremington.blogspot.com/p/neighborhood-commercial.html> (last visited Jan. 28, 2017).

123. Salkin & Lavine, *supra* note 2 at 31 (citing Suzette Parmley, *Trump the best known city casino-game player*, The Philadelphia Inquirer, Dec. 15, 2006.).

agreement and having no influence in the negotiation process.<sup>124</sup>

It is also naïve to think that community organizations have the skills necessary to negotiate with developers that have significant experience in that area.<sup>125</sup> This results in an unfair advantage for the developer.<sup>126</sup> Community organizations are disadvantaged, yet again, because they do not have the financial resources to hire attorneys or separate organizations to conduct the research necessary to create legally enforceable provisions and to pay for counsel.<sup>127</sup>

#### *D. Do CBAs violate land use doctrine?*

Another problem associated with CBAs is that there is the potential to violate certain land use doctrines.<sup>128</sup> More specifically, the principles set forth in the Nollan and Dolan cases.<sup>129</sup> Essentially, both of those cases held that when the government grants a benefit to a beneficiary, the government cannot grant that benefit with a condition that makes the beneficiary surrender a Constitutional right.<sup>130</sup> An argument for developers is that the government forces them, as property owners, to accept a benefit subject to a condition. The condition of entering into a contract, which is a condition not permitted by our Constitution or our land use laws.<sup>131</sup> However, communities can argue that the condition of entering into a CBA substantially furthers a governmental purpose or public need. The governmental or public purpose being the needs and rights of the community, and ensuring that their voices are heard in this process, or the needs and right of the constituents of the government officials. The conditions imposed are to protect the public interest and public welfare. When a CBA is not contingent upon a subsidy and is solely a private agreement, this allows communities to avoid these predicaments.<sup>132</sup> However, this also poses problems because there is no incentive for the developer to negotiate with the community, and we revert back to all the other problems previously mentioned.

### PART IV - HOW CAN WE ENSURE THAT CBAS GENUINELY BENEFIT THE COMMUNITY?

How do we rectify all of these problems previously mentioned? Is there a

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124. *Id.*

125. *Id.*

126. *See Id.*

127. *Id.*

128. Sheikh, *supra* note 8, at 237-38.

129. *See generally* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

130. *Id.*

131. *Id.*

132. Been, *supra* note 12, at 17.

way to ensure that a CBA is a legally enforceable document? Is there a way to give communities power? And is there a way to ensure a CBA represents the goals of the community?

*A. Community organization need the authority to achieve their goals, and CBAs must be inclusive*

For a CBA to be effective, the community groups involved need sufficient leverage to achieve their goals, and sufficient leverage to attempt enforcement.<sup>133</sup> A community's leveraging power usually stems from the amount of their public participation, and their ability to hold elected officials accountable.<sup>134</sup> Also, in certain cases, a developer needs their project to be in a specific location or needs to obtain subsidies for their project.<sup>135</sup> This could provide a large amount of leverage to the community organizations in that particular area.<sup>136</sup> CBAs "work best when there is substantial agency money invested, when they [are] big projects, and when they [are] in hot markets or emerging markets."<sup>137</sup> Additionally, CBAs need involvement from various community organizations and members to truly capture the needs of the community. Without substantial involvement from a diverse group of community members, there is no way to determine if the totality of the community is considered. Even if a particular community organization is not able to achieve all of their goals, the fact that they were a part of the process and expressed their concerns is sufficient and reflects the foundation of our democracy.

*B. CBAs need to be legally enforceable documents*

"[L]egal enforceability should be a prerequisite for something to be termed a CBA."<sup>138</sup> However, how do we make that a reality? If we require developers to enter into a legally binding contract with the community prior to obtaining a bid, or prior to any form of land use, zoning, or subsidy approval that can solve, at least in some part, the issue of enforceability. Developers target specific locations near sports stadiums, shopping centers, colleges, and airports.<sup>139</sup> Without any government involvement, it can be difficult for developers to actually obtain those specific sites. If we elected our officials, and we are the people, how can we be overlooked in this process?

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133. See Meyerson, *supra* note 113.

134. See Beach, *supra* note 114, at 94-95.

135. See Meyerson, *supra* note 113.

136. *Id.*

137. *Id.*

138. Gross, *supra* note 4, at 39.

139. Smith, *supra* note 25, at 328-29.

Why are our government officials, that we elected, not acting in our best interest?

There are a few different options that we can request our legislature take. One statutory change that could take place would be the addition of a CBA requirement or CBA language into our Procurement statute. Procurement is “the process of (i) leasing real or personal property as lessee; or (ii) buying or otherwise obtaining supplies, services, construction, construction related services, architectural services, engineering services, or services provided under an energy performance contract[.]”<sup>140</sup> Procurement allows various mechanisms for procuring goods, such as: negotiation for social and educational services, auction bids, intergovernmental cooperative purchasing and competitive bidding.<sup>141</sup>

Additionally, Procurement provides for certain statutory remedies.<sup>142</sup> This statute would be an ideal placement for language that involved the contracting of CBAs, their requirement prior to obtaining procured services or the like, and their legal enforceability. However, certain agencies are not required to abide by the State’s procurement laws.<sup>143</sup>

### *C. Add additional safeguards to Maryland’s Land Use regulations*

Language added to Maryland’s land use regulations, formerly known as the Development Rights and Responsibilities Agreement, could provide another statutory remedy for CBAs.<sup>144</sup> There are a few different sections of Maryland’s land use statutory regulations that provide a natural extension of the statutes to discuss CBAs and their enforceability. For example, section 3-206 Municipal Growth Element states, “[w]hen developing a municipal growth element of the comprehensive plan, a municipal corporation shall consult with the counties in which the municipal corporation is located.”<sup>145</sup> A progression from this could provide simple language that stated prior to a comprehensive plan’s approval, a developer shall discuss with the community potential benefits conferred onto that community, or shall enter into a legally binding contract with the community that growth is proposed

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140. *State Ctr., LLC v. Lexington Charles Ltd. P’ship*, 92 A.3d 400, 431-32 (Md. 2014).

141. *Id.*

142. *Id.*

143. *Id.* at 431-32 (2014) citing *Building Materials Corp. of America v. Bd. of Educ. of Baltimore Cnty.*, 428 Md. 572, 576, 53 A.3d 347, 349 (2012) (noting that local school boards are not subject to the State’s general procurements laws).

144. Maryland’s Development Rights and Responsibilities Agreement statute was repealed in 2012, and “[t]his section is new language derived without substantive change from former Art. 66B, § 3.05(e)(2) through (6).” Land Use, 2012 Maryland Laws Ch. 426 at 76 (H.B. 1290).

145. Md. Land Use § 3-206 (a)(1).

to transpire in. Similarly, a planning commission is allowed to:

[A]gree with an applicant on use, height, area, or bulk requirements or restrictions that are designed to promote the purposes of the zoning law of the local jurisdiction...[and t]he requirements or restrictions shall have the same force of law, shall be enforceable in the same manner and with the same sanctions and penalties, and shall be subject to the same power of amendment or repeal as though part of the zoning law or map of the local jurisdiction[.]<sup>146</sup>

The planning commission can require that a CBA is entered into prior to approval, and use the exact language in the previous quotation to give a CBA “the same force of law”<sup>147</sup> and “enforceable in the same manner and with the same sanctions and penalties.”<sup>148</sup> Similarly a planning commission agrees on certain requirements or restrictions, so why not make one of those requirements a CBA?

Another statute that can potentially include CBA language, is the Maryland Land Use Statute 7-101. This statute provides for the preservation of natural resources or the establishment of affordable housing. There is actually a bill currently attempting to get passed that provides for annual funding for development purposes, and there are hopes to insert some language that pertains to affordable housing. This is the type of statutory approach that could ensure the community benefits when development projects take place. It ties development funding to affordable housing, and mandates some level of community engagement in the planning process. Although this does not directly address CBAs, it is a small step towards the bigger picture. A statutory approach is a better alternative instead of case-by-case negotiations between developers and community groups that are controlled heavily on power dynamics.

However, we must remember that Maryland is a Home Rule state. Therefore, most municipalities, within the grant of powers given from the Maryland State Constitution, are able to exercise all applicable power and make changes to their local charter. Therefore, if statutory reform were to take place pertaining to CBAs, each county would need to do so separately, as long as there is no conflicting state statute and it is within the power delegated by the State to the counties.

## CONCLUSION

Although CBAs seem like a great idea in theory, they lack legal enforceability, communities lack political power to include tangible benefits, and

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146. Land Use, 2012 Maryland Laws Ch. 426 at 112 (H.B. 1290).

147. *Id.*

148. *Id.*

often the communities are not truly represented in the agreements. If we want CBAs to work to they need to be inclusive, legally enforceable, and concrete as to what is provided and when. Regardless of whether a statute is created, or changed, to ensure that a CBA will work, it is important to recognize providing a benefit “to the extent possible” is equivalent to nothing.